No. 18409

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK URSICH,

Appellant,

vs.

MANUEL G. DA ROSA, ANTONIO GARCIA DA ROSA, MARIA A. ROSA, VICTORINO GARCIA DA ROSA and MARY ROSA SANTOS,

Appellees.

OPENING BRIEF FOR APPELLANT.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Statement of Pleadings and Jurisdictional Facts.

This litigation arises out of an injury suffered by appellant Frank Urisch while he was a member of the crew of and employed as a fisherman aboard the appellees' vessel "PORTUGUESA". The action in the district court was by a complaint for damages under the Jones Act together with a second cause of action for maintenance and cure and a third cause of action for wages to the end of the voyage. [C. 2-6.][1] Only the count based on the Jones Act and the count for maintenance and cure are involved in this appeal.

Appellees' answer denies liability on each and all of the causes of action. The Jones Act count was tried

[1] "C." refers to Clerk's Transcript; "R." to Reporter's Transcript.

by the court sitting with a jury. The jury returned a verdict for the appellees. The count for maintenance and cure was thereafter submitted to the court sitting without a jury and judgment for appellant was ordered, upon the parties stipulation, for $1,000.00 as the principal amount of maintenance due; interest thereon was thereafter disallowed by the court. [R. 196-201.] Findings of Fact were waived on the maintenance and cure count, and judgment on the verdict and on the stipulation for maintenance was entered on October 8, 1962. [C. 15-16.] Appellant filed his notice of appeal on October 19, 1962. [C. 17.]

The jurisdiction of the district court is based upon the Jones Act, 41 Stat. 1007, 46 U. S. C. 688, and upon its admiralty and maritime jurisdiction pursuant to Article III, Section 2, of the United States Constitution and 28 U. S. C. 1333. The jurisdiction of this Court to review the judgment below rests upon 28 U. S. C. 1291, notice of appeal having been filed within the time provided by 28 U. S. C. 2107. [C. 15-17.]

Statement of the Case.

The appellant Frank Ursich was hired by Bido Druskovich, the agent of the appellees, sometime during the summer of 1960, to work as a commercial fisherman on board the vessel "PORTUGUESA". [R. 15, 103.]

On October 14, 1960, the "PORTUGUESA", having returned from a successful fishing trip, was tied up alongside the Van Camp cannery dock in San Pedro unloading its catch. [R. 24-25.] At that time the fish were still frozen hard. [R. 117.]

Appellant and a fellow crew member, Bido Druskovich, were unloading one of the brine tanks located in the middle of the vessel. [R. 76-77, 104.] The tank had an opening two and one-half to three feet square. [R. 29, 77.] The tank contained fish as small as some weighing thirty-five pounds and as large as others weighing one hundred thirty to one hundred fifty pounds, with the larger fish placed on top of the smaller. [R. 26, 28.] The larger fish were taken out first; a rope sling was placed around the tails of the fish and a winch lifted them to the deck and they were placed on the deck near the hatch. [R. 78.]

After the larger fish had been removed the appellant went into the tank to unload the smaller fish by means of a "bucket". [R. 79, 105.] The "bucket" was about 2 to 2½ feet square and was lowered into the brine tank; then it was filled with fish by appellant and hoisted out by means of a winch. [R. 80-81.]

At the time appellant was injured he had filled the "bucket" and was waiting for the winch, with his left arm resting on top of the bucket filled with fish. [R. 33, 84-85.] His head was in the hatch opening either at deck level or just above or below deck level. [R. 82-83, 109.] As appellant knew, Bido Druskovich was working on the deck several feet from the appellant. [R. 84-85.]

There was another bucket on deck alongside of the hatch opening. [R. 82.] Bido Druskovich had lifted

a tuna, weighing some 130 to 140 pounds, from the deck and was about to put it in the bucket on the deck. [R. 106, 108.] Druskovich picked up the fish by taking its tail with his left hand and by hooking a longshoreman's hook, which he carried in his right hand, into the eye of the fish. [R. 108.] While the fish was being lifted, the hook came out of the eye, the fish slipped out of Druskovich's grasp, hit the deck, slid into the hatch, and hit the appellant on the head, shoulder and arm, knocking him down. [R. 32-33, 108-109.] Druskovich then told the appellant, "I am sorry, Frank, I no want to hurt you." [R. 33, 115.] The appellant felt dizzy and had pain in his arm and shoulder; he went to the nurse at the cannery and later to the Public Health Service for treatment. [R. 35, 38.]

It appears from the defense testimony and without contradiction that when the fish fell on him, the appellant was working where he had been assigned, was doing his job in a proper manner, and was not doing anything which caused the accident. [R. 114.]

Appellees' testimony, by way of explanation, was that the fish was handled in the customary manner and that even when it was handled in such customary manner a fish gets loose a couple of times a day; the accident could have occurred because the eye of the fish was soft and the hook pulled out, or because the bones of the fish broke, or because the hook broke. [R. 108,

119-121.] There was no evidence as to which, if any, of the possibilities was the cause of the accident. As a matter of fact, there was no examination of the fish after the accident occurred. [R. 121.]

The testimony established without contradiction that the proper way to place the hook in the eye of a tuna is to place it under the bone in the eye, in order to prevent it from slipping out. [R.88-91, 137-138, 141.] There was no evidence to the effect that Druskovich had done this with the fish that fell.

Appellees' only witness conceded that with big fish, for safety purposes a sling is sometimes used instead of a hook. [R. 119.]

Moreover, Druskovich, appellees' witness, admitted that he knew he was handling the fish in such a manner that it might fall and that he did nothing to prevent it.

> "Q. . . . but you knew that when you handled fish in the manner you were handling that fish, that sometimes they came off and fell, is that right? A. That's right.
>
> Q. And you knew also that you were handling 130 or 140 pound frozen tuna about two feet from a man who is [sic] standing below you, is that right? A. That's right." [R. 127, lines 15-22.]
>
> * * * * *
>
> Q. . . . Knowing that sometimes fish fall off a hook, the way you were handling that fish, did you do anything to prevent this particular fish from falling off the hook? A. No." [R. 128, lines 15-18.]

Appellant requested the trial court to give his proposed Instruction 17 relating to the application of the doctrine of *res ipsa loquitur* and reading as follows:

> "From the happening of the accident involved in this case, an inference arises that a proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence and unless there is contrary evidence sufficient to meet or balance it, the jury should find in accordance with the inference.
>
> "When there is any evidence to the contrary, you must weigh all of the evidence bearing upon the issue of defendant's negligence. If the evidence tending to prove that the accident was caused by a failure to the defendant to exercise the care required of him has greater weight than the evidence to the contrary, you will find in favor of the plaintiff on that issue.
>
> "In order to meet or balance the inference of negligence, the defendant must present evidence to show either (1) a satisfactory explanation of the accident, that is, a definite cause for the accident, in which there is no negligence on the part of the defendant, or (2) such care on the defendant's part as leads to the conclusion that the accident did not happen because of want of care by him, but was due to some other cause, although the exact cause may be unknown. If such evidence has at least as much convincing force as the inference and other evidence, if any, supporting the inference, then you will find against the plaintiff on that issue." [C. 14-A.]

Appellees objected thereto on the ground that they had offered an explanation of the accident and that, therefore, the doctrine did not apply. The objection was sustained. [R. 161-163, 194.]

The trial court, over appellant's objections that neither instruction was applicable under the evidence introduced, gave appellees' Instructions 27-A and 45-B. [R. 156-158, 194.]

Instruction 27-A reads as follows:

> "The mere fact that an accident happened, considered alone, does not as a rule permit the jury to draw the inference that the accident was caused by someone's negligence." [R. 188.]

Instruction 45-B reads in part as follows:

> "If you should find that the defendant was guilty of negligence which proximately caused injury to the plaintiff, and further find that the plaintiff was guilty of some negligence which proximately contributed to his injury, then the total damages awarded the plaintiff must be diminished or reduced by you in the proportion that the amount of contributory negligence chargeable to the plaintiff compares to the amount of negligence chargeable to the defendant." [R. 189-190.]

The appellant objected to the trial court's refusal to award interest from the date that maintenance payments became due. [R. 200-201.]

Questions Presented.

1. Whether in an action for injuries received when appellant was hit by a falling fish being handled by a fellow crew member the court erred in refusing to instruct the jury that the doctrine of *res ipsa loquitur* was applicable.

2. Whether in an action for injuries received when appellant was hit by a falling fish being handled by a fellow crew member the court erred in instructing the jury that no inference of negligence could be drawn from the mere happening of the accident itself.

3. Whether in an action for injuries in which the only witness for the defense conceded that appellant was not doing anything wrong and was where he was supposed to be, the court erred in instructing the jury on the issue of contributory negligence.

4. Whether the court erred in denying to a seaman interest on maintenance from the dates that the maintenance payments became due.

ARGUMENT.

I.

The Trial Court Erred in Refusing Appellant's Proposed Jury Instruction on Res Ipsa Loquitur.

A. When a Defendant Offers an Explanation in a Case in Which the Principle of Res Ipsa Loquitur Is Otherwise Applicable, the Doctrine Is Not Dispelled, Rather It Becomes a Question for the Jury Whether the Inference Created Thereby Has Been Met by the Evidence.

The appellees conceded that based upon the unexplained undisputed facts in this case the cause of the occurrence gave rise to the application of the doctrine of *res ipsa loquitur*. Appellees, in opposing appellant's proffered jury instruction, argued that under *Johnson v. United States* (1948), 333 U. S. 46, 92 L. Ed. 468, *res ipsa loquitur* is not applicable when "the occurrence is otherwise explained." [R. 162.]

The appellees seek to isolate one sentence from the opinion in that case as establishing the controlling test. When the decision is read as a whole, one finds no such narrow interpretation as appellees offer. The Court, in discussing when *res ipsa loquitur* is applicable, stated:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events. . . . The inquiry, however, is not as to *possible causes* of the accident but whether the showing that petitioner was without fault and was injured by the dropping of the block is the basis of a *fair inference that the man who dropped the block was negligent.* We think it is, for human experience tells us that *careful men do not customarily do such an act.*" [At pages 49-50, emphasis added.]

In *Furness Withy & Co. v. Carter,* 281 F. 2d 264 (C. A. 9, 1960), libelant was injured when a steel bar which he was using to operate a device known as the MacGregor patent steel hatch cover, came out of its groove and hit the libelant on the side of his head. Defendants, by way of explanation offered testimony that the device which the libelant had been using was inspected and no defect could be found. This Court, after reviewing the requirements of *res ipsa,* found that the doctrine of *res ipsa* was applicable. Once the inference arises, any counter evidence merely creates an issue of fact for the jury, unless the inference is overcome as a matter of law. To so overcome the inference is not a simple task.

> ". . . It is settled that where the evidence raises an inference that a fact exists, and either party produces evidence of the non-existence of the fact that is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved, the non-existence of the fact is established as a matter of law." *Leonard v. Watsonville Community Hospital,* 47 Cal. 2d 509, 305 P. 2d 36 (1956).

The evidence offered by way of explaining the cause of the accident was far from clear and positive and it certainly was not uncontradicted.

1. The evidence established that the proper manner to insert the hook in the eye of the fish is to get it under the bone. There is no evidence that the hook was inserted in this manner.

2. The explanation offered was that the breaking away of the hook could have been caused by one of

several things, but there is absolutely no evidence as to what the actual cause was.

3. The explanation offered was tantamount to an admission of negligence rather than proof of an absence of negligence. The appellees' witness admitted that he was handling the fish in a manner in which it might be expected to fall under circumstances which could result in serious injury to appellant.

4. Appellees' witness admitted he did nothing to prevent the accident from occurring and that there was a safe way of conducting the operation by the use of slings.

B. The Appellees' Evidence Did Not Amount to an Explanation of the Cause of the Accident.

Appellees from their evidence gave several possible explanations as to the cause of the accident. Appellees' witness, Druskovich, testified that sometimes the eye is soft and the hook pulls out of the eye, or the bones of the fish bust, or the hook breaks, or no matter how careful you are, a fish comes off the hook a couple of times a day. [R. 108, 121.] Appellees introduced no evidence as to the actual cause of the occurrence. Appellees' employees made no examination of the particular fish involved to see which, if any, of the above possibilities occurred. [R. 121.]

To dispel the *res ipsa* inference the evidence must show either the specific cause of the accident and that it was not due to defendant's negligence or that there was no negligent act of defendant which could have caused the accident. *Dierman v. Providence Hospital* (1947), 31 Cal. 2d 290, 295, 188 P. 2d 12; *Ireland v.*

Marsden (1930), 108 Cal. App. 632, 643-644, 201 Pac. 912; *Ybarra v. Spangard* (1949), 93 Cal. App. 2d 43, 209 P. 2d 445.

In view of the fact that the appellant's case is a proper one for the application of *res ipsa loquitur* and the appellees' evidence did not as a matter of law dispel the inference of negligence, or even amount to "an explanation", the question as to the sufficiency of the rebutting testimony was for the jury to decide under proper instructions; therefore, it was error for the trial court to refuse to give the appellant's proffered instruction relating to the *res ipsa* doctrine.

II.

The Trial Court Erred in Giving Appellees' Instruction That No Inference of Negligence Could Be Drawn From the Mere Happening of the Accident (No. 27-A).

A. When the Doctrine of Res Ipsa Loquitur Is Applicable, It Is Error to Give the Instruction.

In the case of *Guerra v. Handlery Hotels, Inc.* (1959), 53 Cal. 2d 266, 347 P. 2d 674, a case involving injuries to a woman passenger in an elevator when her coat sleeve became caught on a door handle throwing her to the ground and wedging her arm between the elevator shaft and the moving car, the court gave a *res ipsa* instruction and also an instruction that the mere happening of the accident does not support an inference of negligence. On appeal, the California Supreme Court held this was error:

> "While it may be possible to give a technically correct explanation of the relationship between the instruction and the doctrine it is difficult as a

practical matter to formulate an explanation which will assure that there will be no confusion on the part of the jurors who, without legal training, are called upon to understand and apply a number of other complex instructions." [at 272.]

See also, *Hanson v. Murray* (1961), 190 Cal. App. 2d 617, 621, 12 Cal. Rptr. 304. The principle of the cited case has even greater force here where the *res ipsa loquitur* instruction was refused.

B. In Certain Situations Such as the Present One, the Mere Happening of the Occurrence Does Give Rise to an Inference of Negligence.

In the case of *Petricich v. Devlahovich* (1952), 107 Fed. Supp. 871, where a fish had either fallen from the hands of a man on the deck of the boat or slipped from the hands of a man in the hold to whom the fish was being handed, the court said:

". . . the physical facts make it clear that a fish weighing from 60 to 80 pounds must have been dropped suddenly . . . this warrants the conclusion that the fish was dropped negligently with sufficient force to achieve the result."

The court went on to state:

"So we are confronted with the fact that whether the doctrine of res ipsa loquitur applies, *Johnson v. United States* (1948), 333 U.S. 46, 68 S.Ct. 391, 92 L.ed. 468, or not, the reasonable inference is that a large fish was dropped without warning by one of the employees of the respondent under circumstances which warranted the conclusion that there was carelessness in handling it. This negligence for which recovery lies." [At pp. 872-873.]

The case of *Jensen v. Minard* (1955), 44 Cal. 2d 325, 282 P. 2d 7, involved the death of a child when the defendant discharged his rifle. The California Supreme Court held that it was prejudicial error to instruct that the mere fact that the accident happened does not support an inference of negligence. The Supreme Court said:

> "Since it was conceded that the fatal bullet was fired by defendant, this instruction in effect told the jury that the fact that Bonnie was killed by a bullet from defendant's gun afforded no evidence of negligence. Ordinarily, however, accidents of this sort do not occur if those using firearms use due care. Even though instructions on the doctrine of res ipsa loquitur were not requested, the jury should not have been foreclosed from considering the evidence provided by the happening of the accident itself in determining whether defendant was negligent." (Citing *Rose v. Melody Lane* (1952), 39 Cal. 2d 481, 247 P. 2d 335; see also, *Hill v. Atlantic Navigation Co.* (C. A. 4, 1955), 218 F. 2d 654.)

It was, therefore, error for the trial court to give the defendant's instruction that the mere fact that an accident happened, considered alone, does not as a rule permit the jury to draw the inference that the accident was caused by someone's negligence.

III.

It Was Error for the Court to Give the Defendants' Instruction on Contributory Negligence (No. 45-B).

The defendants' only witness, Druskovich, testified that appellant, at the time of the accident, "was [not] doing anything that he wasn't supposed to be doing," and "was [not] doing anything wrong," and that "he is doing his work, what he is supposed to be." [R. 114.]

The testimony of the defendants showed that the plaintiff was in no way contributorily negligent in causing the accident. The courts have repeatedly stated that an instruction on contributory negligence should be refused when there is no evidence to support a finding that plaintiff was negligent. *Hardin v. San Jose* (1953), 41 Cal. 2d 432, 440, 260 P. 2d 63; *Borenkraut v. Whitten* (1961), 56 Cal. 2d 538, 543, 364 P. 2d 467; *Bua v. G. I. Taxi Corp.* (1960), 186 Cal. App. 2d 612, 617, 9 Cal. Rptr. 118.

IV.

The Trial Court Erred in Refusing to Give the Plaintiff the Statutory Rate of Interest, When It Awarded Maintenance, From the Date the Money Became Due.

The right of a seaman to receive interest from the date that maintenance became due was clearly stated by this Court in *Medina v. Erickson* (1955), 226 F. 2d 475, 484:

> "Finally, it is contended the court erred in not allowing interest on maintenance, cure and wages from the date they became due. Medina expressly waived his right of appeal from the decree with respect to the award for maintenance and cure, and in view of our reversal of the award for wages, we need only decide whether interest should have been allowed on maintenance and cure from the time they became due.
>
> > 'The right to recover wages, maintenance and cure arises *ex contractu.* The obligation of the owner-operator is "a material ingredient in the compensation for the labor and services of the seamen." (Citing cases.)'
>
> "In the absence of a finding of 'peculiar facts' causing the denial of interest from the date the maintenance and cure became due, we are of the opinion that interest should have been allowed from that date, or dates, rather than from the date of filing the amended libel on October 2, 1951. . . ."

Conclusion.

From the evidence adduced at the trial, the authorities, and the law, it is respectfully urged that the trial court erred in:

1. Refusing to give appellant's instruction on *res ipsa loquitur;*

2. Instructing that no inference of negligence may be drawn from the mere happening of the occurrence;

3. Giving an instruction on contributory negligence when there was no evidence of contributory negligence on the part of the appellant; and

4. Refusing to award interest on maintenance from the time that the money became due.

Respectfully submitted,

MARGOLIS & MCTERNAN,
By BEN MARGOLIS,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BEN MARGOLIS,